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IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM, 1918

No. 485

WILLIAM KINZELL,
Petitioner,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO.

Brief of Petitioner.

STATEMENT OF FACTS.

Petitioner brought this action in a state court of competent jurisdiction in Idaho to recover damages for personal injuries suffered while in the employ of respondent, basing his right of action solely upon the Federal Employers' Liability Act. From a judgment in favor of the employe an appeal was taken by the railway

company to the Supreme Court of Idaho, which court reversed the judgment upon the sole ground that the petitioner was not engaged in interstate commerce at the time of his injury. (Opinion Record, pp. 278-82.)

This court issued a writ of certiorari, and upon that writ the cause is here for determination.

CHARACTER OF PETITIONER'S EMPLOYMENT AT TIME OF INJURY.

At the time of the injury the railway company was engaged in operating a railroad extending from Chicago, Illinois, to Seattle, Washington, over which both interstate and intrastate commerce was daily transported.

Near Ewan, Washington, were two wooden bridges or trestles which were part of the main line of railroad of respondent and over which all of its trains were operated. The bridges or trestles had been constructed in 1908 at the time the railroad line was built. Some time prior to the day when plaintiff was injured, the railway company had commenced filling in the two bridges or trestles with earth and it was while engaged in such work and as a part thereof that petitioner was injured.

A brief reference to the testimony with respect to the character of this work and the exact duties of respondent seems essential.

Kinzell testified that the railway company's road master had stated to him that the bridges had to be filled in. (R., pp. 83-4.)

The assistant engineer of respondent, Pinson, testified he had made an inspection of the bridge where Kinzell was injured; knew its life and capacity; estimater it had a prospective life of two years at the time

of his last inspection in April, 1914; that the filling of the bridges was for the purpose of replacing them. (R., pp. 183-4.)

He testified as follows:

Q. When did you make this inspection?

A. In April, 1914.

Q. You said the bridge then had two years of life?

A. At least two years.

Q. You mean by that, after that time you would have to fill in there, or build a new bridge; is that the idea?

A. Probably at that time. (R., pp. 183-4.)

As the petitioner was injured in February, 1915, this bridge at the time of the injury had an estimated life of approximately one year. The respondent company recognized the necessity which it would soon be under of replacing in some way this old bridge.

Campbell, superintendent of respondent, having charge of the road work at the time petitioner was injured, testified that the work consisted of filling in the two bridges or trestles with an embankment which was intended to replace them, the material used being obtained from certain line changes and grade reductions. (R., p. 179.) At the time petitioner was injured, the filling in had not been completed and the rails and ties were resting upon the wooden bridge rather than upon the embankment; that the work was being prosecuted with a twofold purpose; that the railroad line, track and grade near Ewan was being altered and improved, necessitating the removal of a considerable amount of material, and at the same time the material was being used for filling in the bridges or trestles. (R., p. 181.)

Mr. Campbell also testified that the fill was an improvement in the railroad; that they considered a gravel

fill superior to a wooden structure and that it was a permanent improvement that they were making at the time. (R., p. 180.)

During the progress of the work of filling these bridges, interstate trains were passing over the railroad and these bridges in both directions daily (R., p. 181), and it was the undoubted purpose of the respondent company to so do this work as not to interrupt the transportation over its line of either interstate or intrastate trains.

When the work of filling the bridges was first started, what was known as Lidgerwood equipment was used, that is, side-dump cars containing the material to be used were placed on the bridge and a plow run through the material in the cars scraping or plowing out the material which fell outside of the rails and ties. (R., p. 180.)

Respondent's superintendent, Campbell, further testified that when the material reached an elevation so high that it would remain on the track, such equipment could no longer be used and a machine known as a "dozer" or "bull dozer" was used instead. This machine was equipped with projecting wings which tended to widen out the material after it had been dumped. (R., p. 181.) Mr. Campbell further testified that the dozer was not used until the material got so high that it would remain on the track and that its purpose was to level the fill, shovel the material out and make the embankment. (R., pp. 180-181.) The following is an excerpt from his testimony:

> "Q. At the time of this accident this bridge 140 had been filled right up into the ties?
>
> A. They don't use the dozer until it gets up high enough so they have to push it out, or widen it out, to continue construction; in—

Q. In other words, you dont' use the dozer until it gets level with the ties?

A. Exactly so.

Q. Mr. Kinzell's duties on that kind of work were also to take the shovel and get the rocks off the ties and off the track?

A. Yes, sir.

Q. And after the dozer was taken away when any trains were going by it was necessary that these rocks should be taken off the track?

A. Yes.

Q. That was part of his duties?

A. Yes.

Q. So that trains could pass there with safety?

A. Yes. That was the reason it was done, to make it safe for the operation of trains, so we would not be delaying any through accidents occurring." (R., pp. 181-182.)

Kinzell's duties in connection with the work of filling in this bridge were (1) to determine the particular place where the material might be dumped to the best advantage (R., p. 84), (2) to operate the wings of the dozer in such a way as to spread the material out from the ties and rails (R., p. 86), and (3) to clear the track of loose rock and material so as to avoid the danger of derailing trains or cars. (R., pp. 84-85.)

The method of operation was described by petitioner substantially as follows: A trainload of material ordinarily consisting of about twenty-five cars was dumped, the dozer was then used to spread the material, drawn to one end of the bridge, the train uncoupled from the dozer and returned to the place where the line changes were being made for more material. During the absence of the train the petitioner and

another with their shovels cleared the material from between the rails. Upon the approach of the train of dump cars to the dozer it was the custom to approach at a speed of two or three miles per hour, and a slow order had been issued restricting the speed at which the work train should be operated to four miles per hour. (R., p. 85.) As the train ordinarily coupled to the dozer it was at such a slow speed and so easily that "if the knuckle happened to be closed they would stop and open the knuckle, but if the knuckle happened to be open they would go up and make a careful coupling." (R., p. 85.)

Petitioner had no control over the operations of the work trains, or the manner in which the coupling was made. Those duties were all performed by the trainmen upon the gravel train. (R., pp. 84-5.)

On the day of the accident several trainloads of material had already been dumped on the bridge. At the precise time of the accident Kinzell with a co-laborer was standing upon the dozer with his back to the approaching train holding to a brace-rod with his right hand, determining where he would have the next load of material dumped. Suddenly his companion called to him to look out, and glancing over his shoulder he saw the work train about to strike the dozer at an excessive rate of speed, estimated by Kinzell to be about ten miles per hour. (R., p. 86, 101.) Testimony of the co-employe, Lee, (R., p. 109). Petitioner did not have time to get off the dozer, but grasped the brace-rods with both hands and with all his strength. When the train struck the dozer he was torn from the brace-rods and thrown from the dozer and between the wheels of the first dump car (R., p. 87), suffering injuries which were serious, painful and permanent and which have rendered him a cripple for life. The train

struck the dozer so hard that the other employe was jerked loose from his hold and thrown against a crank shaft. (R., p. 109.)

One of the charges of negligence made by petitioner was that the work trains were customarily equipped with tail air hose so that the brakeman on the rear end of the train could, by opening the valve in the tail air hose, set the air brakes without the necessity of signaling the engineer. (R., p. 4 and 5.)

Petitioner testified that work trains were usually equipped with tail air hose and that he had observed such equipment on the day of his injury on one of the work trains, but did not know whether the other train was so equipped or not (R., pp. 99-100). He also testified to the propriety of having such equipment. Witness Moody, a brakeman, testified that that train was not so equipped. (R., p. 158.)

The negligence charged therefore was:

(1) That the work train, as it made the coupling at the time of the accident, was traveling at an excessive and unusual rate of speed and that any speed in excess of four miles per hour was unreasonable and dangerous.

(2) That the train approached the dozer at a reckless speed and struck the dozer with such force at said high and dangerous rate of speed that the petitioner was thrown therefrom (R., p. 4);

(3) It was also charged that the respondent was careless in failing to keep a proper lookout as the work train was propelled towards the dozer (R., p. 4);

(4) The failure to have a tail air hose.

Kinzell testified that a short time previous to the dozer being struck he had observed the approaching train then about a quarter of a mile away and supposed

that it would take it quite a while to come up to the dozer, traveling at its usual slow rate of speed; he had observed nothing unusual about the speed of the train when he had so seen it (R., p. 86).

The trial court overruled a motion to direct a verdict in favor of the defendant based upon three grounds (1) that there was no evidence of negligence, (2) that the plaintiff assumed the risk, and (3) that the plaintiff was not, at the time of the injury, employed by the defendant in interstate commerce or performing any service in interstate commerce; and submitted the case to the jury as one for their determination under the Federal Employers' Liability Act.

The jury returned a general verdict in favor of the petitioner for $35,000. At the request of the respondent, certain interrogatories were submitted to the jury and the answers thereto found that the respondent was not guilty of contributory negligence and that no sum should be deducted from the damages sustained by him as attributable to contributory negligence (R., p. 16).

Petitioner moved for a new trial, which motion was denied (R., p. 72). An appeal was taken from the judgment and from the order denying the motion for a new trial.

The Supreme Court of Idaho reversed the judgment on the sole ground that the petitioner was not engaged in interstate commerce at the time of his injury so as to entitle him to maintain an action under the Federal Employers' Liability Act, and directed that the judgment be reversed, with instructions to dismiss the action.

SPECIFICATION OF ERRORS.

I.

The Supreme Court of the State of Idaho erred in holding that at the time of his injury the petitioner was not engaged in interstate commerce so as to entitle him to maintain an action for his injuries under the Federal Employers' Liability Act.

II.

The Supreme Court of Idaho erred in reversing and setting aside the judgment of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone.

ARGUMENT.

The facts establish:

(1) That the fill was being made to replace a bridge on the interstate line of the defendant which had performed its duty and which in the interest of safe operation required replacement within a short time, and that the work was being performed while that bridge was being used daily by the interstate trains of respondent;

(2) That as an essential and necessary part of his duties the petitioner was required to keep the bridge clear for the passage of these interstate trains.

The trial court's instruction to the jury upon the question of the plaintiff being engaged in interstate commerce is instruction No. 14 (R., p. 29). The instruction fairly presented the law.

The Supreme Court of Idaho was of the opinion that the work was too remote to interstate commerce to be within the act.

The question is clearly presented: Was the petitioner at the time of the injury so employed as to come within the terms of the Federal Employers' Liability Act?

The principles governing this case are well understood and the decisions of this court need not be extensively referred to. We may be permitted, however, to quote from

Pedersen v. D. L. & W. R. Co., 229 U. S. 146,

where it is said:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.
>
> True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

It cannot be said that the work which petitioner was performing at the time of his injury was a matter of indifference to interstate transportation over the respondent's line, nor, we believe, can it be said that his work was so remote from interstate commerce as not to be in a practical sense a part of such commerce. Under all of the testimony, it must be said that this work was being performed for the purpose and to the

end of keeping the interstate railroad line and track of the respondent in suitable condition for use in interstate commerce. Even if it might be considered that it was a matter of indifference to interstate commerce as to whether or not the respondent company should, at that particular time, fill the bridge, instead of delaying the performance of the work until the bridge was in need of immediate repairs, still the company having determined to make the fill at the time, it was no longer a matter of indifference to interstate commerce as to how this work should be done. For the safety and freedom from interruption of the respondent company's interstate business required that this work be done in such a manner as not to delay, or interrupt, or otherwise interfere with the movement of interstate trains.

Had Kinzell and his co-laborer failed in the proper discharge of their duties of spreading the material away from the rails and ties, and in clearing the track of loose rock and dirt to insure the safe running of trains, until the track was so covered with material as to prevent the running of trains, or until a train was wrecked or a car derailed, there could be no question but what the laborers employed to clear the track so as to permit the movement of interstate commerce, would be deemed to have been employed in interstate commerce within the Federal Employers' Liability Act.

Southern Ry. Co. vs. Puckett, 244 U. S. 571;
Lombardo vs. Boston & M. R. R. Co., 223 Fed. 427;
Columbia & P. S. R. Co. vs. Sauter, 223 Fed. 604;
Philadelphia B. & W. R. Co. vs. McConnell, 228 Fed. 263;
Thompson vs. Columbia & P. S. R. Co., 205 Fed. 203;
Denver & R. G. Co. vs. Wilson, 163 Pac. 857.

In Southern Ry. Company vs. Puckett, *supra*, a wreck had occurred on tracks used in interstate commerce, and while the employee was carrying some blocks on his shoulder to be used in jacking up the wrecked car, and replacing it upon the track he stumbled, fell and was injured. This court said:

> "From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce."

The trestle or bridge which was being filled and the track which was being kept clear for the passage of interstate trains had long been used in interstate commerce. The work was not the construction of a new piece of line which had never become an instrumentality used in interstate commerce. According to the railroad company's own showing, the time was approaching when the bridge must, in order for the railroad company to carry on its interstate business, be either filled or replaced by a new bridge. Had the railroad company delayed until the bridge was no longer capable of supporting the interstate trains passing along the line, the construction of a new bridge in its place would have been directly connected with the transportation of interstate commerce.

> *Columbia & P. S. R. Co. v. Sauter*, 223 Fed. 604 (C. C. A. 9th Circuit).

The Supreme Court of Idaho in its opinion concedes that such is the effect of the above decision and does not disagree therewith. In that case bridges maintained by two railroads over a certain stream had been destroyed by freshets and the two companies had joined in the construction of a trestle for the purpose of expediting travel, one company building from one

side of the river and the other company building from the other side. An employe was killed during the work. His administrator prosecuted the action. The deceased was engaged at the time of his death in clearing a space in which piles could be driven, not to support the old bridge, but to support the new trestle that was being constructed. The precise question was whether or not deceased was engaged in interstate commerce at the time he was killed. The court applied the tests announced in the Pedersen case and held that the work was not being done independently of the defendant's interstate commerce, and was not a matter of indifference to such commerce, but was so closely connected therewith as to be a part of such commerce.

It will doubtless be urged by respondent's counsel that the work in the Sauter case was in repairing the old bridge, which had been destroyed by the freshet but reference to page 607 of the 223rd Federal Reporter will disclose the fact that it was agreed by counsel that:

> "The deceased was engaged in making clear a space in which piles could be driven, not to support the old bridge, but to support the new trestle."

a work which was distinctly new, but which was so intimately connected with the movement of interstate commerce as to be for all practical purposes a part of such commerce.

Is the replacement, if it precede the actual falling in of the old bridge, different in character from the replacement if the railroad company is dilatory in its duty and waits until the bridge is no longer capable of supporting traffic before it replaces it? In principle, there can be no distinction.

If a man, employed to clear a track after it is in such a condition that interstate transportation is stopped, is within the protection of the act, surely it cannot be argued that those men employed in keeping the road bed in condition so that transportation will not be interrupted are not within the act. For the safety and integrity of interstate commerce depends quite as much upon the road being kept in usable condition as upon its being cleared and opened after it has been permitted to become unsafe or insufficient for such commerce.

In the discharge of petitioner's duties and in the performance of the work in which respondent was engaged, the protection of the respondent company's interstate commerce by keeping the track and bridge clear and in usable condition, entered inseparably into the replacing of the bridge and the replacing of the bridge itself entered into the maintenance of the way as much as the replacement of an old rail with a new one. The instrumentality had been devoted to interstate commerce.

This case is not one wherein it is sought to extend the doctrine of the Pedersen case, but one in which a strict application of the conclusions in that case is determinative in petitioner's favor.

The work in which Kinzell was engaged at the time of the accident was upon an instrumentality already in use in interstate commerce.

In

San Pedro L. A. & S. L. R. Co. v. Davide, 210 Fed. 870,

the work of the employe consisted in ballasting the main track of a railroad then used in interstate commerce, a work differing from that in which petitioner was employed only in the quantity of material used and

the manner of doing the work, and it was held the employe was within the protection of the act.

Following the decision in the Pedersen case, it was attempted to extend the terms of the act to include practically all employees engaged in railroad work however remote it might be to interstate commerce. The act was held not to cover employment in a tunnel which was only partially bored, since it was not in use and never had been in use as an instrumentality for interstate commerce.

Raymond v. C. M. & St. P. R. Co., 243 U. S. 43.

An employe of a railroad company, injured while mining coal in a colliery operated by the railroad company, was not within the act, even though the coal ultimately was intended by the railroad company for use in interstate commerce.

Delaware L. & W. R. Co. v. Yurkonis, 238 U. S. 439.

An employe in a machine shop operated by a railroad company for repairing parts of locomotives used both in interstate and intrastate transportation was not within the act while engaged in taking down and putting into a new location in such shop an overhead countershaft through which the power was communicated to some of the machinery used in the repair work.

Shanks v. D. L. & W. R. Co., 239 U. S. 556.

But those cases are inapplicable here. Under the admitted facts in this case, the railroad company was, in filling that trestle, engaged in maintaining its interstate road at that point in proper condition after it had become an instrumentality of interstate commerce and during its use as such.

The Supreme Court of Idaho in this case conceives that the case comes within the rule of new construction work as in the case of

Raymond v. C. M. & St. P. Ry. Co., 243 U. S. 43.

The court holds that filling a trestle which is being used in interstate commerce is new construction and the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the trestle. The conclusion is supported by two citations of authority, to which we will refer hereafter.

The conclusion, however, is in direct conflict with the language of this court in the Pedersen case, where it is said:

> "Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. * *
>
> The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used there in. We think there is no merit in this."

Suppose that the progress of the work on that trestle had extended to the point where the petitioner, Kinzell, was taking up a rail of the track to replace it upon the fill instead of upon the bridge. Would he not at that moment have been engaged in work which would bring him within the statute? Suppose he were removing the old ties from the trestle and replacing

them upon the fill. Under the authority of the Pedersen case, would he not have been engaged in interstate commerce? The answers obviously must be that he would have been. So it was necessary preliminary to the relaying of the track, to the entire replacement of the bridge, that this other work should be done, and it was as essential thereto as it was that Pedersen should carry bolts for use in the replacement of an old girder in a bridge.

But the Supreme Court of Idaho holds that the replacement of the track even would not have been an employment within the act and that the fill would not become a part of the railroad until it had been completed and the track placed upon it. In support of its final conclusion that the petitioner was not engaged in interstate commerce at the time of his injury, the Supreme Court of Idaho cites United States v. C. M. & P. S. Ry. Co., 219 Fed. 632, a district court decision, and Dickinson v. Industrial Board of Illinois, 280 Ill. 342.

The first case cited was an action by the United States against the railroad company for violation of the Hours of Service law (Act. March 4, 1907, 34 Stat. at L. 1415, Ch. 2939). The case was submitted upon the pleadings and a stipulation. An engineer, who had previously been engaged in interstate commerce, was assigned to duty on an engine hauling a work train engaged in filling a bridge on defendant's interstate line, and he was so wholly engaged in such service for fifty-nine days, during which time he was permitted to remain on duty continuously for more than sixteen hours. The court held that the railroad company was not thereby guilty of violating the Hours of Service law, though the engineer was subject to recall for interstate service during such period and at the

end thereof was reassigned to interstate commerce. The Hours of Service law provides:

> "The provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employe' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train."

The act applies only to employes engaged in the transportation of passengers or property and is by no means so broad as the Employer's Liability Act. No contention was made by the government that the employe was, because of the character of his work, within the act, but it was contended that he came within the act solely because he had been prior to that time an engineer engaged in interstate commerce and was "potentially" subject to recall. The case would not have been cited had not the court used the words "not repairing" in parenthesis in the following portion of the opinion:

> "Now when analyzed, the stipulation means nothing more, as I understand it, than that at one time Crown was regularly employed by the defendant in moving interstate commerce; that thereafter

for a period of 59 days he was regularly employed in operating a work train, wholly within the state of Idaho, for the purpose of filling (not repairing) a bridge upon a line of road which was a part of an interstate highway; that thereafter he again went back into interstate commerce service."

The decision is certainly not in point.

The Illinois case cited, Dickinson v. Industrial Board of Illinois, 280 Ill. 342, was one where a carpenter employed by a railroad engaged in both interstate and intrastate commerce, employed in building forms on the margin of a right-of-way into which concrete was to be poured to form retaining walls for the elevation of the tracks, was injured by sawdust flying in his eye. It was held he was not engaged in interstate commerce. He was employed on a structure which had not yet become an instrumentality of interstate commerce. The state supreme court held that his work was a matter of indifference so far as the interstate commerce in which the railroads were engaged was concerned, although the structure to be erected might eventually become an instrumentality of such commerce.

In the case at bar, the petitioner's employment was not a matter of indifference to interstate commerce. In the first place, the structure upon which he was working and which he was filling had already long been used in interstate commerce. In the second place, the work was being performed for the purpose of replacing that structure when it was approaching the end of its usefulness, and improving the interstate roadway at that place. In the third place, his work in keeping the track clear of material which was dumped upon it was not a matter of indifference to the intterstate commerce of the railroad company. His failure to perform

that duty or his negligent performance thereof might easily have resulted in the derailment of an interstate train and the interference with interstate traffic. As the superintendent of the railroad said, that work was performed because it was necessary to keep the track clear and prevent accidents and derailments.

The Supreme Court of Idaho concedes and refers to the fact that it was one of the duties of the petitioner to remove dirt and rocks from the track which lodged thereon when the cars were dumped and which might, if allowed to accumulate, interfere with interstate commerce. They dispose, however, of this by holding that it was but an incident to the work of constructing and filling and did not change the character of the employment.

It was just as essential that he should spread the dirt on the outside of the rails away therefrom with the dozer as that he should with the shovels clear the tracks between the rails. In both cases, he was keeping the track clear for the passage of trains. The act of keeping that trestle and that railroad track clear was performing an act for the purpose of furthering interstate commerce.

THE REPLACEMENT OF INSTRUMENTALITIES ALREADY EMPLOYED IN INTERSTATE COMMERCE IS AN ACT IN THE FURTHERANCE OF INTERSTATE COMMERCE.

The work of replacing an old girder with a new one in a bridge used by interstate trains and the work incident thereto in carrying the material to the point of use is an employment in interstate commerce.

Pedersen v. D. L. & W. R. Co., 229 U. S. 146.

The replacing of old rails with new ones brings the employe engaged in such work within the Federal Employers' Liability Act.

Philadelphia B. & W. R. Co. v. McConnell, 228 Fed. 263 (C. C. A. 3rd Circuit).

In the above case, the employe was assistant foreman of a gang on a work train. A few days before the injury, the work train had taken new rails to a place where a track was to be repaired. The old rails were moved and new ones installed. On the day plaintiff was injured, the said train and gang were engaged in removing the old rails from where they had been left between the tracks. While plaintiff was on a car in the performance of his duties, members of the gang under the supervision of the foreman threw a rail on the car in such a manner that one end projected beyond the side of the car, was struck by a passing train, thrust against the plaintiff and injured him. The Circuit Court of Appeals used the following language, which is very apt in this case:

> "The work of the train on which the plaintiff was employed had nothing to do with the immediate or direct movement of interstate commerce. Being a repair train, its direct relation was to instrumentalities of commerce rather than to the movement of commerce. With respect to its movement on the day of accident, its journey was defined and was wholly within the State of Pennsylvania. * * *
>
> Here the work was not being done independently of the interstate commerce in which the defendant was engaged, nor was the performance of the work a matter of indifference so far as that commerce was concerned. The removal of old rails from between the tracks on the roadbed of

> a railroad over which moves heavy traffic, both interstate and intrastate, constitutes keeping the tracks and roadbed in suitable condition for interstate commerce, and is as necessary for the proper maintenance of the tracks and roadbed as renewing the tracks. The work of which the plaintiff's was a part, was the repair of the roadbed by replacing old rails with new ones. This includ. ed removing old rails and installing new ones. The work of removing old rails was not complete when they were lifted from their place upon the ties and tossed upon the roadbed, but was complete only when they were carried away from the place where they lay between the tracks."

If the substitution of a heavy rail for a light one, of a new rail for an old one, brings an employee engaged in that work within the terms of the act, and if the work preliminary to the actual laying of the rails and the taking and carrying them away is such as brings him within the act, then why is not the replacement of a wooden bridge by a new bridge or a dirt fill of such character that an employe engaged therein is within the terms of the act, and especially in a case like this where there is no change of route, where the bridge or trestle is used continuously in interstate commerce and the replacement is continued and carried on during such act?

It has been held that an employe engaged in substituting a new bridge for an old one is within the terms of the act.

> *Cincinnati N. O. & T. P. R. Co. v. Hall*, 243 Fed. 76.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the above case seems to be directly in point and directly in conflict with the Idaho decision. The facts there were substantially as follows:

Preparatory to the substitution of a new bridge for an old one over Sody creek in Tennessee, on the main line of the defendant's road, the defendant caused a cut to be made in the fill approaching the bridge and immediately next to a stone abutment at the south end of the bridge. The cut was to make a place for a wooden bent, which with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and another permanent structure built in its place.

Hood, an employe, was with others engaged on the cut. As the work proceeded, the face of the fill was shored up, planks being placed upright against the face of the cut braced by crosspieces running from the face of the planks to the face of the abutment.

To the end that traffic might not be interrupted, strong stringers were placed under the ties to hold up the tracks, the ends on one side resting on the abutment and on the other on the roadbed itself, or upon a heavy cross sill. The fill was composed of sand and some clay mingled with rocks and boulders. Trains passed over from time to time.

Hood was working under the tracks when the fill caved in, and was fatally hurt. In the course of the opinion, the court says, citing:

Pedersen v. D. & L. W. R. Co., 229 U. S. 146.

> "The interstate character of Hood's service is by the agreement admitted; but, since such admission of matter of law may not be conclusive of the court's duty to inquire into its jurisdiction, it may be said the facts bring the case within the act without any doubt."

No distinction can be drawn between the work in which Hood was employed and the work in which peti-

tioner was employed in this case. In each case, the object of the work was to replace a bridge. In both cases, the employe was engaged in work designed to prevent the interruption of traffic during the replacement of the bridges.

Another decision in conflict with the decision of the Supreme Court of Idaho in this case is that of the Circuit Court of Appeals for the Fourth Circuit in

Southern Ry. Co. v. McGuin, 240 Fed. 649.

In that case the court held that a sectionman engaged in assisting a railroad surveyor in a survey made to improve a curve in a track used in interstate commerce is employed in interstate commerce within the meaning of the Federal Employers' Liability Act. A few minutes before the deceased was killed, the surveyor had sent him to a designated point to hold a rod by means of which he intended to take a back sight. He was struck by a train and killed. The surveyor completed the work by placing the stakes, but the change in the track was never made. The defendant was a carrier of both interstate and intrastate commerce. The court said:

> "The case of Pedersen v. Lelaware, etc., R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 154, seems conclusive on the first point. It was there held that the work of keeping in repair the track, roadbed and other instrumentalities of a railroad engaged in interstate commerce is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. The work held to be a part of interstate commerce was the carrying of bolts or rivets to be used in taking out an old girder of a bridge and putting in a new one. Here the work was surveying and marking the changes to be

made in the position of the cross-ties and rails, so as to make a better curve. No distinction can be founded on the failure of the railroad to complete the work by actually making the changes contemplated. Making the survey was as much a part of the work as laying the rails according to the survey. *The numerous cases in which the work was on things which had not at the time become instrumentalities of interstate commerce obviously have no application.*" (Italics are ours.)

A case closely in point is the decision of the Circuit Court of Appeals for the Fourth Circuit in

Coal & Coke Ry. Co. v. Deal, 231 Fed. 604,

where an employe was engaged in setting new telegraph poles to replace defective poles along the railroad. The lines were used to send messages directing the operation of the trains of the company engaged in interstate commerce. The replacement was accomplished first by the erection of the new poles and then merely transferring the wires from the defective poles to the new ones. The court held that the replacement of the old poles with new ones and the removal of the wires was so closely connected with interstate commerce that an employe injured in the setting of the poles was within the terms of the act, and this was before the wires had been transferred to the new poles. The case in principle is directly in point and directly in conflict with the conclusion of the Supreme Court of Idaho.

The work which was being done by petitioner in this case, and by the employes in the several cases cited, upon instrumentalities already used in interstate commerce, is clearly distinguishable from the character of the work in those cases in which the employe was engaged at the time of his injury in working upon new

instrumentalities which had never been used in interstate commerce, and from other cases in which the work being done was at most only incidentally connected with interstate commerce and that connection so remote that it could not be said to be connected therewith in a practical sense.

Let it again be emphasized that the respondent company was anticipating by scarcely a year the time when this bridge must needs be replaced or its interstate commerce be seriously imperiled, and the work of replacing the bridge by a fill was being done while interstate commerce was being conducted over the line, and in a manner to insure the safety and security of such transportation.

SCOPE OF REVIEW BY THIS COURT.

The interstate character of petitioner's employment being established, the judgment of the trial court should be affirmed.

The Act of Congress, under authority of which the writ was granted in this case, requires that there be certified to this court for review and determination any cause of the classes specified in the statute. The entire case is open for examination by this court, when in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record.

> *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280;
> *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251.

While those cases were on writs of certiorari to Federal Courts, there is nothing in the Act of Congress giving to this court supervisory power in certain cases

over the courts of the states which distinguishes the scope or breadth of the review from that to be exercised where the writ of certiorari is directed to a circuit court of appeals.

In a brief of respondent in opposition to petitioner's motion to place this case on the summary docket, it is said after referring to the Act of Congress under authority of which the writ was issued:

> "According to the letter of this statute, authority is conferred upon the supreme court by certiorari to require that there be certitfied to it *for review and determination any cause* of the classes specified. It is *a cause* that may be brought up, not a mere controversy in a cause, nor a question involved therein, but it is *the cause* that may be brought up, and *the cause* may be brought up *for review and determination.* Therefore, the respondent has a right to apprehend that this court may hold that the case in its entirety is here for review and determination. A reason for a literal interpretation of the words of the act is, that it may be presumed that Congress intended that the exercise of its appellate jurisdiction by this court in cases originating in the state courts should be uniform and harmonious with jurisdiction and practice in cases which were originally litigated in federal courts of inferior jurisdiction."

We proceed therefore to a discussion of the essential questions upon which the right of the plaintiff to recover rests.

The complaint charged negligence; the answer pleaded that the defendant was not guilty of negligence, assumption of risk and contributory negligence, in addition to denying that the plaintiff was engaged in interstate commerce.

Upon these questions there is nothing unusual in the case distinguishing it from the ordinary suit for injuries to the person. These questions, however, demand some brief attention, sufficient to show that there was evidence showing or tending to show the negligence of defendant, evidence negativing contributory negligence on the part of the plaintiff, and that the evidence was such that it could not be said that the plaintiff had assumed the risk as a matter of law.

NEGLIGENCE OF RESPONDENT.

Viewed most favorably to the respondent the question of negligence presented a controverted question of fact. The verdict of the jury settled such question of fact.

Smiley v. Kansas, 196 U. S. 447.

Such also is the rule in Idaho.

Montgomery v. Gray, 26 Ida. 583-585.

With reference to the negligence in propelling the train at an excessive speed: It has already been pointed out that the gravel train as it was operated ordinarily, approached the dozer at a speed of from two to three miles per hour, and that there was a work order requiring that it should not be operated at a speed in excess of four miles per hour.

On the occasion of the injury, both Kinzell and his co-laborer, Lee, who were upon the dozer at the time of the accident, testified that the train was going at a speed much in excess of four miles an hour, and at a speed of approximately ten miles per hour when it struck the dozer. That it was an unusual speed is shown by the fact that although both Kinzell and Lee

were holding onto the dozer they were jerked loose, Kinzell thrown between the dozer and the train and Lee thrown against the crank shaft.

Specific reference to the testimony may be helpful. Petitioner testified that in all the time he worked upon the dozer it was the custom for the gravel train to approach carefully, at a speed of between two and three miles per hour; to make a slow, careful and gradual coupling; if the knuckle happened to be closed they would stop the train and open the knuckle, if it was open they would back and make a careful coupling. (R., p. 85); that a slow order had been issued by defendant, or at least he had been informed by the roadmaster that a slow order had been issued. (R., p. 85.) This was not denied.

Respondent's witness Moody, brakeman on the gravel train, testified they had an order not to exceed four miles per hour (R., p. 155).

The witness Lee corroborated plaintiff that it was customary for the gravel train to make the coupling with the dozer at a speed of about two miles per hour (R., p. 109).

Plaintiff testified that at the time of his injury the train struck the dozer with such unusual force that his handhold on the crank shaft and brace rod was forcibly broken, and he was knocked loose and thrown from the dozer (R., pp. 86-7). His testimony is positive that had the speed of the gravel train been no greater than four miles per hour the impact would not have been so severe as that which he actually experienced. (R., p. 85.) He also testified, from experience both in general railroad work and particularly in the operation of the dozer, that speed of from two to three miles per hour would be a reasonable speed at which to couple onto the dozer; and the speed on the occasion of his

injury was greater than that. (R., p. 94.) His testimony is positive that it was never customary for the gravel train to strike the dozer with a force used at the time of his injury. (R., p. 90.)

In this testimony the plaintiff is corroborated, not alone by the testimony of Lee, but by his conduct. Lee seems to have realized just preceding the shock that the gravel train was approaching at an unusual rate of speed for he called out a warning to Kinzell. Lee corroborated Kinzell's testimony with reference to the speed of the train and the shock of striking the dozer. (R., pp. 108-9.)

Lee testified the train was traveling at the rate of at least ten miles per hour at the time of the collision (R., p. 109); that the gravel train was not provided with a tail air hose (R., p. 109); and that the air brakes were not applied until after the train struck the dozer (R., p. 109).

This was the testimony of two men who had been working for a considerable length of time upon the dozer in question, and who had been present when the coupling was made on numerous occasions. They knew from experience at what speed, approximately, the coupling was ordinarily made, and had experienced the nature of the impact when the gravel train struck the dozer at the usual speed at which the coupling was customarily made, and they experienced further the vast difference between the impact usually made and the impact felt on the particular occasion when they were both torn loose from the brace rods, one of them thrown from the dozer itself, and the other hurled against the crank shaft.

Employes of the respondent working either upon the gravel train or who, by coincidence happened along the track at about the time of the collision, were called as

witnesses and their testimony created a direct conflict in the evidence and presented a question for the jury.

The complaint also charged that the failure to equip the train with a tail air-hose on the rear car of the gravel train, so that the brakeman near that end of the train could set the air brakes without the necessity of signaling to the engineer, was negligence.

It is further alleged in the complaint that if the gravel train had been provided with a tail air hose and valve, the rear brakeman could himself have stopped the train, and that even if this duty was performed too late to avoid the collision, that the injuries suffered by the plaintiff by being dragged on the ground for a considerable distance would have been avoided.

Upon the trial Kinzell testified that a train such as the gravel train which collided with the dozer, going at a rate of speed of say four miles an hour, could be stopped by the application of the air brakes in from four to ten feet. In explaining the use of the tail air hose, the plaintiff testified that it was for use in emergency cases, where it became necessary for the brakemen to act quickly, and that by opening the valve on the tail air hose the brakes would be applied automatically to every car in the train, and that where so used a train moving four miles per hour could be stopped in from four to ten feet by the brakeman, without any action whatsoever on the part of the engineer. He further said that it was the duty of the rear brakeman on emergency occasions to apply the air brakes by this tail air hose valve (R., pp. 88-89).

Two gravel trains were being used in hauling material at the time of plaintiff's injury. On the day of his injury one of the trains was equipped with a tail air hose. The plaintiff was unable to say whether or not the other train was so equipped, or whether or not the train which collided with the dozer was so equipped

at the time of the accident (R., pp. 99-100). He also testified that if the train was so equipped, the tail air hose was not used and the brakes were not applied until after he was struck (R., p. 89; testimony of Lee, R., p. 109).

Defendant's witnesses testified that the gravel train in question was not equipped with a tail air hose. The evidence of the witnesses for petitioner was positive as to the propriety of equipping a gravel train with such appliance and its use; that such trains were commonly so equipped, and that being so equipped the brakeman could easily have stopped it in a short distance.

The defendant upon this question introduced three of its employes. One of these witnesses, Lake, was the man who had made the model of the dozer, and the extent of his testimony was to the effect that the gravel car was not equipped with a tail air hose, and that had it been it would have been necessary to place a hook near the top of the rear car upon which to hang the hose within reach of the brakeman.

The second witness, Moody, who was the rear brakeman upon the gravel train at the time of the accident, testified that the only reason the tail air hose was not used was that no place had been provided for it, and that the company did not furnish them to use on the cars. (R., p. 158.) He nowhere testified that the gravel train should not have been so equipped.

One other witness, Shaughnessey, testified that no place had been provided on this gravel train, and that there was no such hose in use on the particular train in question.

It was disclosed by the cross-examination of the witness Moody that one of the trains had been equipped with a tail air hose, but it was his contention that such equipment was used only as a signal whistle (R., p.

160-161), no explanation, however, being given why it was practical to use a tail air hose as a whistle and at the same time impractical for the brakeman by opening a valve situated at the same place as the whistle would be, to himself apply the air brakes and stop the train. No one of defendant's witnesses denied the propriety of equipping the train with such appliance.

In this state of the record the court gave to the jury instruction No. 12 (R., p. 28), a reading of which shows that the question was properly submitted. Viewed most favorably to respondent there was a conflict in the evidence and the verdict of the jury has settled the fact.

The negligence of the respondent having been settled by the verdict of the jury, we pass to the defenses:

CONTRIBUTORY NEGLIGENCE.

In an examination of the case, it is not necessary to long pause upon this question.

It was maintained by the respondent that the petitioner was guilty of contributory negligence. The matter was expressly submitted to the jury, upon proper instructions, and the jury has found that the petitioner was not guilty of any contributory negligence. See answer to special interrogatory 2 (R., p. 16).

It was the contention of the defendant at the trial that the plaintiff was guilty of contributory negligence in that having seen the train approaching at a distance of about a quarter of a mile, he had then turned his back and ignored its approach. It was the testimony of the petitioner, however, that when he saw the train approaching he noticed nothing unusual in the speed or the manner in which it was approaching; relied on its being operated in the usual way, and proceeded

with the performance of his duty of determining the place where the material would be dumped, supposing that the train would approach and make the coupling in the usual manner. The question in any event was for the jury.

ASSUMPTION OF RISK.

The trial court declined to hold, as a matter of law, that the injury to the petitioner resulted from a risk assumed by him. This was done in denying the motion for a directed verdict and in submitting the question to the jury.

It was urged by the railroad company that the injury to petitioner was caused by a risk which had been assumed, the basis of this contention being the fact that Kinzell had seen the train approaching the dozer at a distance of one-quarter of a mile, at which time he had opportunity to leave the dozer.

The question of assumed risk was by the court submitted to the jury under proper instructions, namely, Instructions No. 15, No. 2-A and No. 10-A. By their verdict, the jury has determined that the petitioner did not assume the risk.

Upon the trial, Kinzell testified that he did see the train approaching the dozer a quarter of a mile away; that he saw nothing unusual about it and supposed that it would take quite a while to get up to the dozer, the same as it had been taking them right along (R., pp. 86, 88), and at the usual speed at which the work train was operated it would not have been near the dozer at the time of the accident. He and his co-laborer, therefore, turned their attention to the work of estimating and determining where the coming train-load of material should be dumped, and relying upon the observ-

ance of the slow order and upon the custom of making the coupling at slow speed, petitioner paid no further attention to the approaching train. When he was first warned by the cry of his companion that the train was about to strike the dozer at an excessive rate of speed, he had no time or opportunity to avoid the accident by jumping from the dozer (R., p. 89).

From the foregoing facts, it is clear that the only risk which the petitioner assumed was that attendant upon the making of the coupling at the usual rate of speed, which had not exceeded two or three miles and which by the slow order was limited to four miles. That risk arising from the railroad company's negligence in operating the train and making the coupling at an excessive rate of speed, estimated to be about ten miles an hour, was not assumed unless such fact became known to the petitioner before the accident and while he still had time to avoid the consequences of the company's negligence, and the testimony clearly shows he did not know of this negligence until it was too late to avoid the accident.

Chesapeake & Ohio R. Co. v. De Atley, 241 U. S. 310,

is directly in point. There this court held that a railroad employe, though assuming the risk normally incident to the boarding of a moving train in the discharge of his duties, does not assume the risk of injury involved in an attempt to board a train operated at an unusually high and dangerous rate of speed until made aware of the danger, unless the speed and consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other, and that it was for the jury to say whether a brakeman on a freight train assumed

the risk of injury in an attempt in the discharge of his duties to board the engine of his train, which was moving directly toward him at a speed of twelve miles per hour. The case clearly points out the principle which is controlling here, as follows:

> "It is insisted that the true test is not whether the employee did, in fact know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

It will be remembered also, in this connection, that Kinzell had been working on this dozer about a month (R., p. 84), during which time the coupling between the work train and the dozer had always been made at a reasonable rate of speed, not exceeding two or three miles per hour, and in a careful manner (R., p. 85). Under these circumstances, he had a right to assume, until notified to the contrary or until he knew to the contrary, that the approach and coupling would be made in the usual manner.

It cannot be said, as a matter of law, that it was obvious to Kinzell that the respondent's employes were

guilty of negligence or that their negligence was fully known or appreciated by him prior to the warning given by Lee, too late for him to do other than he did in the protection of himself from injury.

MEASURE OF DAMAGES.

It is held in

Chesapeake & Ohio R. Co. v. Kelly, 241 U. S. 485,

that the question of the proper measure of damages was inseparably connected with the right of action under the Federal statutes and must be settled according to the principles of law enforced in the Federal Courts.

Instruction No. 6 given by the court (R., pp. 26 and 27) is in accord with the principles of law enforced in the Federal Courts.

It has been urged by the respondent upon motion for a new trial that the instruction given denied to it the benefit of the rule that in computing the damages recoverable, the verdict should be based upon the present value of those damages. But under the decision of this court in

Louisville & N. R. Co. v. Holloway, 246 U. S. 525,

the instruction did not deny to the respondent the benefit of such rule. Under the authority of the decision last cited, as well as upon general principles, the instructions given fairly presented the question to the jury.

THE AMOUNT OF RECOVERY.

The nature and character of the injuries of the petitioner, their permanency, his youth and ability to earn, stamp the verdict as a just one.

The trial court, who heard the testimony, saw the petitioner and his condition, declined to disturb it. It does not appear that the action of the state court in sustaining the verdict was based upon an erroneous theory of the Federal law and this court will therefore not interfere with the same.

Louisville & N. R. Co. v. Holloway, 246 U. S. 525.

A case of a mere excessive verdict upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination in the Federal Supreme Court.

Southern Ry. Co. v. Bennett, 233 U. S. 80.

INSTRUCTIONS.

An examination of the instructions given and refused, will show that the case was submitted to the jury upon proper instructions.

We respectfully submit that the judgment of the Supreme Court of the State of Idaho should be reversed and the judgment of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, should be affirmed.

Respectfully submitted,

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